U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 02 March 2004

BALCA Case No. 2002-INA-299
ETA Case No. P2000-CA-09503382/ML

In the Matter of:

EL ATACOR RESTAURANT # 7,
Employer,

on behalf of

JUAN NARANJO-PELAYO,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Peter Morgan, Agent
Pico Rivera, California
For Employer

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Juan Naranjo-Pelayo ("Alien") filed by El Atacor Restaurant # 7 ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act") and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties.

STATEMENT OF THE CASE

On January 10, 2000, Employer filed an application for labor certification on behalf of the Alien for the position of Cook, Specialty Foreign Food. (AF 77-78).

On May 24, 2002, the CO issued a Notice of Findings ("NOF") indicating the intent to deny the application on two grounds. (AF 73-76). The first ground was that Employer did not appear to have the ability to provide permanent full-time employment to the Alien. (AF 74). The CO noted that according to the Job Service's records, all of the individuals on Employer's payroll worked on a part-time basis. Employer was advised that to remedy the deficiency, Employer should supply rebuttal evidence demonstrating its ability to provide a full-time job for U.S. applicants at the terms and conditions stated on the ETA 750A. Employer was requested to include a copy of its business license and state and federal business income tax returns. (AF 74).

The CO also found that the four years experience requirement was unduly restrictive because it is not a normal requirement for the successful performance of the job in the United States. (AF 74-75). The CO noted that Employer's business license identified the business as a "taco stand." Therefore, the CO found that the job classification was Specialty/Fast-Food Cook, requiring only six to twelve months of experience. (AF 74). The CO required Employer either to amend the requirement and readvertise or to justify the requirement as a business necessity. (AF 74-75).

On June 11, 2002, Employer submitted its Rebuttal. (AF 60-72). Employer asserted that it was able to provide permanent full-time work to any qualified applicant. Employer explained that it hired part-time workers because there were insufficient qualified Mexican cooks. Employer noted that the Alien was working two part-time jobs in two different sites owned by Employer. (AF 60-61). Employer submitted copies of the Alien's pay stubs from both sites. (AF 66-71). Employer asserted that the Alien will be working on a full-time basis at site # 7. (AF 60-61).

Employer also argued that it was a full course restaurant that required a cook with four years of experience and submitted a copy of its menu. (AF 67). Employer denied that it was a "taco stand," as the CO suggested. Employer indicated its willingness to change its requirements to that of Cook, Restaurant with two years of experience. Employer also indicated that it was willing to retest the market but under protest. In addition to the above noted documents, Employer enclosed a copy of the business license, a certificate of professional food management issued to the Alien and a proposed advertisement. (AF 62-66).

On July 1, 2002, the CO issued a Final Determination ("FD") denying certification. (AF 57-58). The CO found that the evidence presented by Employer did not demonstrate its ability to hire a cook on a full-time basis. Employer argued that there was a shortage of Mexican food cooks and submitted copies of the Alien's pay stubs. Employer, however, did not submit copies of the income tax returns requested by the CO in the NOF. Therefore, the CO found that Employer did not provide convincing evidence that it was able to provide permanent, full-time employment at the terms and conditions stated in the labor certification application. (AF 58).

Additionally, the CO was unconvinced by Employer's argument regarding the restrictive requirement of four years of experience. The CO found that the business licenses described the restaurant as "fast food" and a "taco stand." (AF 58). Additionally, the menu and the evidence submitted indicated that the restaurants were a chain of fast-food outlets offering standard Mexican food. The CO found that Employer did not justify its need for the requirement and therefore the requirement was unduly restrictive. (AF 58).

On August 5, 2002, Employer filed a Request for Review and the matter was docketed in this Office on September 17, 2002. (AF 1-56). Employer asserted that it properly documented and addressed all the issues raised by the CO and argued that it demonstrated that it had an on-going business, that there was a full-time position available, that it had the ability to pay the wages and that it was willing to retest the job

market. Employer requested that the case be remanded for reconsideration. (AF 1-2). Along with the Request for Review, Employer submitted copies of payroll payments, a copy of the business license, a copy of the menu, copies of the income tax returns for the years 2000 and 2001, and a letter from the city of Montebello indicating that Employer is classified as a restaurant. (AF 5-56).

DISCUSSION

Twenty C.F.R. § 656.3 defines employment as "permanent full-time work by an employee for an employer other than oneself." An employer bears the burden of proving that the position is permanent and full-time and if an employer fails to meet this burden, certification may be denied. *Gerata Systems America, Inc*., 1988-INA-344 (Dec. 16, 1988) (*en banc*).

The CO in the NOF found that because all of Employer's workers were part-time employees, Employer did not appear to have the ability to provide full-time employment to U.S. applicants. To remedy the deficiency, the CO advised Employer that it must provide rebuttal evidence demonstrating that it was able to provide permanent full-time employment to a U.S. worker at the terms and conditions stated in the ETA 750A. (AF 74). Employer, however, limited its Rebuttal to making self-serving and undocumented assertions that it was able to provide full-time work to any qualified applicant. Employer's sole attempt at documenting its ability to provide full-time work was its submission of a business license and pay stubs. (AF 63-71).

The employer bears the burden of proving all aspects of the application. 20 C.F.R. § 656.2(b). Twenty C.F.R § 656.25(e) provides that an employer's rebuttal evidence must rebut all of the findings in the NOF and that all findings not rebutted shall be deemed admitted.

In the Rebuttal, it was Employer's burden to rebut the CO's finding, as the CO determined that Employer did not have the ability to hire a U.S. worker on a full-time

basis. Employer's burden was not met by providing copies of pay stubs. This Board has held that a CO's finding which is not addressed in the rebuttal is deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*). Further, failure to address a deficiency noted in the NOF supports a denial of labor certification. *Reliable Mortgage Consultants*, 1992-INA-321 (Aug. 4, 1993); *Ray Department Stores, Inc*., 1993-INA-183 (Sept. 23, 1994). Therefore, Employer's failure to meaningfully address the CO's finding that Employer was unable to provide a full-time job is grounds for denial and is, by itself, sufficient to deny Employer's application.

Additionally, the CO specifically requested copies of Employer's state and federal income tax returns because those documents would support a finding that Employer could provide permanent full-time employment to a qualified U.S. worker. Employer in its Rebuttal did not submit copies of any of its income tax returns.[1] If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc).* Denial of certification is proper when the Employer fails to provide reasonably requested information. *O.K. Liquor*, 1995-INA-7 (Aug. 22, 1996); *China Inn Restaurant*, 1993-INA-496, 497 (Aug. 26, 1994). Where Employer answers the findings in the NOF with general objections, certification is properly denied. *Ramsinh K. Asher*, 1993-INA-347 (Nov. 8, 1994).

As the employer bears the burden of proving that a position is permanent and full-time, certification may be denied if the employer's own evidence is not sufficient. It follows that while the CO's findings may not be based on speculation, undocumented statements of an employer which are inconsistent or illogical are not compelling evidence of entitlement to certification. *Gerata Systems America, Inc.,* 1988-INA-344 (Dec. 16, 1988) (*en banc).*

[1] Employer in its Request for Review at AF 2 implied that it is submitting the income tax returns for the second time. The record reflects that the income tax returns were only submitted with the Request for Review. A review of Employer's Rebuttal shows that Employer listed all the exhibits enclosed with the Rebuttal and the income tax returns were not included on this list. (AF 61).

Because Employer failed to demonstrate his ability to provide a permanent and full-time job, and did not produce the income tax requested by CO in the NOF[2], we find that the denial of labor certification was proper. Accordingly, the following Order shall enter[3]:

ORDER

The CO's denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the
Board of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges

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[2] We note that Employer in its Request for Review submitted a series of documents including copies of income tax returns. However, this evidence cannot be weighed by this Panel, because our review must be based on the record upon which the CO reached his decision. Evidence first submitted with the Request for Review cannot be weighed. *Memorial Granite*, 1994 INA 66 (Dec. 23, 1994). Additionally, the employer's last opportunity to supplement the factual issues of the case is in the Rebuttal. 20 C.F.R. § 656.24. Therefore, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). Unfortunately, Employer wasted the opportunity to comply with the CO's request in the Rebuttal, it was *then* that the Employer had the burden to provide the documentation.

[3] Since we are affirming the CO's denial on the above stated grounds, we will not address the CO's finding in regards to restrictive requirements.

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Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.